

### 26.1 General Provisions

The Virginia Freedom of Information Act (FOIA) was enacted in 1968 to ensure public access to state and local government meetings and records; FOIA establishes a presumption of openness and defines specific exemptions which allow for closure of meetings or withholding of records. Access to federal government records is controlled by the Federal Freedom of Information Act.<sup>1</sup> FOIA does not direct that any meeting or records covered by its provisions be closed or withheld. It simply *allows* them to be. The choice on whether to exercise the exemptions under FOIA is the public body's or the record custodian's.

Other laws may specifically direct that particular information be withheld. For example, Title 24.2 specifically directs that no social security numbers or parts thereof be open to public inspection. Other laws in Title 24.2 restrict access to particular election records. FOIA expressly provides that Title 24.2 controls access to voter registration and election records in the event of conflict. (§ 2.2-3703) If Title 24.2 is silent on access to a particular record, FOIA controls. No similar provision applies to meetings. FOIA generally must be followed for meetings of the State Board and electoral boards, or any subcommittee or study committee formed to advise those boards. Section 24.2-107 provides that certain election preparation activities are not "meetings" based on the presence of more than one electoral board member, so long as the members do not engage in discussion or deliberation which would otherwise constitute a meeting under FOIA.

FOIA was rewritten and clarified in 1999, following a two-year study in which many of the affected communities actively participated. It was then recodified effective October 1, 2001 when Title 2.1 on the general administration of government became Title 2.2. The various exemptions for records were categorized and reenacted in 2004, to make them easier to find.

The Virginia Freedom of Information Advisory Council was created in 2000 to conduct training and provide advisory opinions and guidelines on FOIA. The Council has established phone numbers for those who have questions about the Act -- (804) 225-3056, or toll-free 1-866-448-4100. The council's website, at <http://foiacouncil.dls.virginia.gov>, provides a valuable resource on the administration of FOIA and news on training conducted by Council staff.

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<sup>1</sup> The federal FOIA does not apply to state and local governments regardless of receipt of federal funding ([US DOJ website](#)).

This chapter of the GREBook deals broadly with FOIA and with the aspects of FOIA and related election laws that particularly affect elections. The main source for information, resources and training materials on interpretation and implementation of FOIA is the [Virginia Freedom of Information Advisory Council](#).

### **26.1.1 Duty of Public Officials To Read And Be Familiar With FOIA**

Section [2.2-3702](#) requires all members of the electoral board, the general registrar, and ALL employees of the registrar's and electoral board's offices to be familiar with how FOIA affects them. All individuals should be aware that FOIA not only covers written documents, but also electronic documents (including e-mail). Care must be taken not to destroy "records" (including electronic records) that concern the transaction of public business except as directed by the appropriate [retention schedules](#) adopted pursuant to the [Virginia Public Records Act](#).

For purposes of FOIA, the general registrar should be considered the "public body's administrator" unless the electoral board has its own administrative staff. Within two weeks of any board member's appointment or reappointment, the public body's administrator is required by FOIA to provide the member with a current copy of [The Virginia Freedom of Information Act \(FOIA\)](#).

The general registrar provides the current FOIA to each electoral board member appointed or reappointed, and to new members of the registrar's office staff or the electoral board's staff. The easiest way to get a copy of the current FOIA is to print it from the FOIA Council website (<http://foiacouncil.dls.virginia.gov/>) or use the [searchable, on-line version](#).<sup>2</sup>

### **26.1.2 What entities are covered under FOIA?**

The three-member SBE and the 134 three member electoral boards are "public bodies" under FOIA. All of their meetings are covered under FOIA. Records in the possession of the Secretary and staff of the SBE, the staffs of the electoral boards, and the general registrars and their staffs are also covered by the FOIA unless Title 24.2 specifically limits access to a particular type of election or voter registration record thereby overriding FOIA.

### **26.1.3 Presumption of Openness**

Unless a public body, its officers or employees expressly invoke a specific exemption provided by FOIA or other statute, every meeting must be open to the public and all public records shall be available for inspection and copying upon request. All public records and meetings are presumed open, unless an exemption is properly invoked. (§ [2.2-3700](#))

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<sup>2</sup> SBE previously printed FOIA along with some of the other acts supplemental to the election laws. All such printed publications (last published in 2001) are totally outdated and should not be used. Because the entire state Code is now available for free on the internet, this secondary publication is no longer published by SBE.

#### **26.1.4 Exemptions Must be Narrowly Construed**

The provisions of FOIA shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government. Any exemption from public access to records or meetings must be narrowly construed and no record can be withheld or meeting closed to the public unless specifically made exempt by FOIA or other specific law. (§ [2.2-3700](#))

#### **26.1.5 Attempt To Reach Agreement with the Requestor**

FOIA is not intended to discourage free discussion by government officials or employees of public matters with the citizens of the Commonwealth. All public bodies and public officials should make reasonable efforts to reach an agreement with a requestor concerning the production of the records requested. (§ [2.2-3700](#)) This may include discussions or correspondence with the requestor in order to ensure the public body produces all pertinent public records requested. Also, such discussion can help clarify (and thereby narrow) a request that at first seems overwhelming. While FOIA is about records, not information, requestors appreciate assistance guiding them to the records that answer their questions.

#### **26.1.6 Enforcement**

In any action to enforce FOIA, the public body bears the burden of proof to establish an exemption by a preponderance of the evidence. Any failure by a public body to follow the procedures established by FOIA is presumed to be a violation. (§ [2.2-3713](#))

#### **26.1.7 Penalties**

In a proceeding against members of public bodies, the court, if it finds that a violation was willfully and knowingly made, shall impose upon such member in his individual capacity, whether a writ of mandamus or injunctive relief is awarded or not, a civil penalty of not less than \$250 nor more than \$1,000. For a second or subsequent violation, the civil penalty shall be not less than \$1000 nor more than \$2,500. (§ [2.2-3714](#))

Electoral board members, registrars, and their staffs should be aware that this applies to each person individually, and that a minimum \$250 fine may be applied for “willful” violations of FOIA requirements.

### **26.2 Electoral Board Meetings and Minutes**

With few exceptions, all meetings of public bodies must be open. (§§[2.2-3701](#), [2.2-3707](#) and [§ 2.2-3711](#)) "Open meetings" or "public meetings" carry certain requirements under FOIA.

### **26.2.1 What “Meetings” Fall Under FOIA?**


“Meeting” or “meetings” means the meetings including work sessions, when sitting physically, or through telephonic or video equipment pursuant to § [2.2-3708](#), as a body or entity, or as an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any public body. (§ [2.2-3701](#))

The gathering of employees of a public body shall not be deemed a meeting subject to the provisions of FOIA. (§ [2.2-3701](#))

A quorum of an electoral board is two members. The “social exemption” (described below) may cover many occasions when two or more Electoral Board members are present (for example, traveling together), but no public business is being conducted. It is best to avoid even the appearance that any public business has been discussed outside of the board's public meetings.

Two or more electoral board members may be present for the following purposes without a meeting provided that no discussion or deliberation takes place that would otherwise constitute a meeting:

- to prepare ballots, election materials, or voting equipment,
- to inspect current or potential polling places, or
- to train election officials. (§ [24.2-107](#))

 The exemptions in § [24.2-107](#) may only be used to carry out the specified tasks.

### **26.2.2 The Social Exception...**

Nothing in FOIA shall be construed to prohibit the gathering or attendance of two or more members of a public body (i) at any place or function where no part of the purpose of such gathering or attendance is the discussion or transaction of any public business, and such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the public body, or (ii) at a public forum, candidate appearance, or debate, the purpose of which is to inform the electorate and not to transact public business or to hold discussions relating to the transaction of public business, even though the performance of the members individually or collectively in the conduct of public business may be a topic of discussion or debate at such public meeting. (§ [2.2-3707](#))

### **26.2.3 No Electronic Meetings for Electoral Boards; New Exception for Emergencies and Disabilities**

In 2007, FOIA was amended to allow members to participate in meetings electronically under certain strict circumstances (provided a quorum is still physically assembled in a public location).

Electronic meeting prohibitions: Electoral boards and local boards generally may not conduct meetings to discuss or transact public business through telephonic, video, electronic, or other communication means where the members are not physically assembled. (§§ [2.2-3707](#), [2.2-3708](#))


Specific exceptions to the electronic meetings prohibition apply to state public bodies, the UVA Board of Visitors, and certain licensing proceedings. None of these exceptions apply to local electoral boards.

However, FOIA in § [2.2-3708.1](#) provides an emergency exception that may allow an individual board member to participate electronically from a remote location in qualifying circumstances and subject to certain conditions:

- a. If, on the day of a meeting, a member of the public body holding the meeting notifies the chair of the public body that such member is unable to attend the meeting due to an emergency and identifies with specificity the nature of the emergency, and the public body holding the meeting (a) approves such member's participation by a majority vote of the members present and (b) records in its minutes the specific nature of the emergency and the remote location from which the member participated. Such participation by the member shall be limited each calendar year to two meetings or 25 percent of the meetings of the public body, whichever is fewer; [or]
- b. If a member of a public body notifies the chair of the public body that such member is unable to attend a meeting due to a temporary or permanent disability or other medical condition that prevents the member's physical attendance and the public body records this fact and the remote location from which the member participated in its minutes;


An individual member's electronic participation when authorized is subject to further conditions:

- A quorum of the public body must be physically assembled at the primary or central meeting location; and
- The public body arranges for the voice of the remote participant to be heard by all persons at the primary or central meeting location.

 The prohibition on local boards holding electronic meetings (outside of the new exception) must be considered whenever electoral board members are on the phone, as two members are a quorum. Members should refrain from discussing public business using the phone.

[Virginia Freedom of Information Advisory Opinion 19 \(2004\)](#) advises that two members of a three-member electoral board may communicate using e-mail without violating FOIA so long as it is not simultaneous communication that would comprise a meeting for FOIA purposes (that is, it acts more like a letter than a phone call). Since such e-mails are public records, the opinion also recommends a system where all e-mails are copied to

the registrar and kept on file for public inspection. If the electoral board has its own staff, they could be copied to that person for public inspection.

 Interactive audio or video may be used to expand public participation. (§ [2.2-3708](#))

## **26.2.4 Public Notice Requirements**

Election law requires the electoral board of each city and county to meet during the first week in February and during the month of March each year at the time set by the board and at any other time on the call of any board member. (§ [24.2-107](#)) Two members constitute a quorum. Notice of each meeting must be given to all board members either by the secretary or the member calling the meeting at least three business days in advance except in the case of an emergency as defined in § [2.2-3701](#). Notice must be given to the public as required by § [2.2-3707](#). All meetings must be conducted in accordance with the requirements of the Virginia Freedom of Information Act (§ [2.2-3700](#) et seq.) except as § [24.2-107](#) provides for certain election preparation activities.

Notwithstanding the public notice requirements of § [2.2-3707](#), two or more members of an electoral board may meet on Election Day to discuss a matter concerning that day's election, where such matter requires resolution on that day, and an effort has been made by all available means to give notice of the meeting to all board members. (§ [24.2-107](#))

Every public body shall give notice of the date, time, and location of its meetings by placing the notice in a prominent public location at which notices are regularly posted and in the office of the clerk of the public body, or in the case of a public body which has no clerk, in the office of the chief administrator. Publication of meeting notices by electronic means is encouraged. Notice must be posted at least three working days prior to the meeting. (§ [2.2-3707](#))

The public notice must be posted in a public area at the registrar's or electoral board's office. It must also be posted in another prominent public location where meeting notices are normally posted. For example, a copy may be provided to the city clerk or county administrator's office to be posted on the public bulletin board there. It is not necessary to post notice at the Clerk of Court's office, but it may be used as "a prominent public location." If the locality maintains an electronic bulletin board for meeting notices (probably online, or on the local government cable access channel), it also fulfills this requirement.

Notice, reasonable under the circumstance, of special or emergency meetings must be given at the same time notice is provided to members of the public body conducting the meeting. (§ [2.2-3707](#)) "Emergency" means an unforeseen circumstance rendering the notice required by FOIA impossible or impracticable and which requires immediate action. (§ [2.2-3701](#))

A meeting by the electoral board on Election Day to solve a problem which needs immediate attention is a public meeting, and the public cannot be excluded (if any public is present). However, such meetings are exempted by § [24.2-107](#) from the public notice

requirement.<sup>3</sup> Efforts must be taken, however, by all available means to give notice of the meeting to all board members. These are still "meetings," and minutes must be kept. (§ [24.2-107](#))

- ① The State Board of Elections convenes for a public meeting early on Election Day then goes into recess. This allows them to meet if needed on Election Day while fulfilling the notice requirements of FOIA.

## **26.2.5 Maintain Annual Notification List**

While public bodies are allowed to require those requesting meeting notices to annually file a written request, as a practical matter it is often easier to maintain an ongoing list (adding or subtracting as requested). Many people will agree to receive notices by email, though if someone prefers US Mail, their choice must be honored.

- ① To promote public relations, include any reporters or news outlets covering elections in the jurisdiction on the notification list.

## **26.2.6 Agenda Packets Are Open**

At least one copy of all agenda packets and, unless exempt, all materials furnished to members of a public body for a meeting must be made available for public inspection upon request at the same time these documents are furnished to the members of the public body. (§ [2.2-3707](#))

## **26.2.7 Spectators May Film or Record Meeting**

Spectators have the right to photograph, film, record, or otherwise reproduce any portion of a meeting required to be open. Public bodies cannot select meeting facilities that prohibit recording but may adopt rules governing the placement and use of equipment to prevent interference with the proceedings. (§ [2.2-3707](#))<sup>4</sup>

## **26.2.8 Minutes Are Required**

Because the electoral board's minutes must be available for public inspection in either the general registrar's office or the board's office, the secretary should promptly prepare and deliver the draft minutes to that office after each meeting. Once finalized and adopted by the board (preferably at the next meeting), the final minutes should then be promptly filed

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<sup>3</sup> "Notwithstanding the public notice requirements of § 2.2-3707, two or more members of an electoral board may meet on election day to discuss a matter concerning that day's election, where such matter requires resolution on that day, and an effort has been made by all available means to give notice of the meeting to all board members." (§24.2-107)

<sup>4</sup> Updated 7/1/2010.



with that same office. If the board or registrar has their own website, the draft and final minutes may also be posted there.<sup>5</sup> (§ [24.2-107](#))

- ① Minutes of the State Board of Elections are available on the [Commonwealth Calendar](#) and the State Board's website. See Chapter 1.

## **26.2.9 Votes Must Be In Open Meetings**

FOIA requires that all public business be transacted by public votes in open meetings unless a specific statutory exception applies or allows closure. For example, certain electoral board election preparation activities are not considered meetings and certain topics such as voting equipment security may allow closing a meeting. §§ [24.2-107](#), [24.2-625.1](#). FOIA does not allow voting in secret, written ballots, nor telephone pollings by one board member of the others. Voting by telephone or other electronic communication is permitted only in limited emergency circumstances. (§ [2.2-3710](#)) (See electronic meetings and emergency exception, above.)

## **26.2.10 Polling the Members**

The law allows individually "polling" members of a public body. However, because two electoral board members are a quorum, such "polling" cannot be done by the members. That would be a "meeting" under FOIA. If one member polled others by telephone, the polling would also be an illegal electronic meeting.

A common use of "polling" is for the registrar or a staff member to contact each of the board members to determine when they are available to meet before the Secretary issues the meeting notice or asks which items should go on the agenda. (§ [2.2-3710](#))

## **26.3 Closed Meetings**

### **26.3.1 Closed Meetings Permitted For Strictly Limited Purposes**

Public bodies may hold closed meetings only for strictly limited purposes, enumerated in § [2.2-3711](#). Listed below are the only purposes, of the current 29, that the State Board or electoral boards are likely to ever need. (For the exact wording of the full, allowed purpose, see § [2.2-3711](#)(A))

Public bodies may hold closed meetings only for the following purposes (the numbers below correspond to the closed meeting purposes in the law):

- (1) Discussion, consideration, or interviews of prospective candidates for employment; assignment, appointment, promotion, performance, demotion, salaries, disciplining or resignation of specific public officers, appointees or employees of any public body....

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<sup>5</sup> The 2002 General Assembly required all state boards to post their minutes on the internet. While this requirement does not currently extend to local boards, the policy preference for prompt and easily accessible minutes has been established.




(4) The protection of the privacy of individuals in personal matters not related to public business....

(7) Consultation with legal counsel and briefings by staff members or consultants pertaining to actual or probable litigation, where such consultation or briefing in open meeting would adversely affect the negotiating or litigating posture of the public body; and consultation with legal counsel employed or retained by a public body regarding specific legal matters requiring the provision of legal advice by such counsel. For the purposes of this subdivision, "probable litigation" means litigation which has been specifically threatened or on which the public body or its legal counsel has a reasonable basis to believe will be commenced by or against a known party. Nothing in this subdivision shall be construed to permit the closure of a meeting merely because an attorney representing the public body is in attendance or is consulted on a matter....

(15) Discussion or consideration of medical and mental records excluded from this chapter [FOIA] pursuant to subdivision A 5 of § [2.2-3705](#)....

(19) Discussion of plans to protect public safety as it relates to terrorist activity and briefings by staff members, legal counsel, or law-enforcement or emergency service officials concerning actions taken to respond to such activity or a related threat to public safety; or discussion of reports or plans related to the security of any governmental facility, building or structure, or the safety of persons using such facility, building or structure....

(35) Discussion or consideration by the State Board of Elections or local electoral boards of voting security matters made confidential pursuant to § [24.2-625.1](#).

 FOIA does not require that these discussions be held in closed meetings. The board members will need to decide if a closed meeting is warranted, if allowed.

### **26.3.2 Votes Must Be In Open Meeting**

To be effective, any action taken in a closed meeting must be followed by a vote in an open meeting; the substance of the action must be reasonably identified in the open meeting. (§ [2.2-3711](#))

Noncompliance with open meeting requirements in selecting public officers results in their having *de facto* officer status: their official actions are valid until they obtain notice of the legal defect in their selection. (§ [2.2-3711](#))

### **26.3.3 Conferences Presumed Open**

Nothing in this section (§ [2.2-3711](#)) shall be construed to prevent the holding of conferences between two or more public bodies, or their representatives, but these conferences shall be subject to the same procedures for holding closed meetings as are applicable to any other public body.

### **26.3.4 Motion to Close Meeting**

Any closed meeting must be "surrounded" by an open meeting. (§ [2.2-3712](#)) The open meeting must be convened, with proper public notice (unless the interview exception below applies), prior to the motion being made to close the meeting. The motion must identify the subject matter, purpose, and applicable exemption for discussing that subject in a closed meeting. The motion should identify the subject matter without providing details that are the basis for closure. For sample motion, see Appendix A in the FOIA Council's guide, [Access to Public Meetings](#).

### **26.3.5 Closed Interviews Permitted**

The notice provisions of FOIA do not apply to closed meetings of a public body held solely for the purpose of interviewing candidates for the position of "chief administrative officer" (i.e., general registrar). Prior to any such closed meeting for the purpose of interviewing candidates, the public body shall announce in an open meeting that such closed meeting shall be held at a disclosed or undisclosed location within fifteen days thereafter. (§ [2.2-3712](#))

### **26.3.6 Discussion Restricted to Exempted Matters Covered by the Motion**

The public body holding a closed meeting must restrict its discussion during the closed meeting only to those matters specifically exempted from the provisions of FOIA and identified in the motion as required above. (§ [2.2-3712](#))

An open meeting with notice is required before a public body may take action on matters discussed in any closed meeting unless some specific statutory exemption applies. (§§ [§2.2-3707](#) and [2.2-3712](#))

### **26.3.7 Certification of closed meeting**

At the conclusion of any closed meeting, the public body must immediately reconvene in an open meeting and take a roll call or other recorded vote to be included in the minutes of that body, certifying that to the best of each member's knowledge (i) only public business matters lawfully exempted from open meeting requirements under FOIA and (ii) only such public business matters as were identified in the motion by which the closed meeting was convened were heard, discussed or considered in the meeting by the public body. Any member of the public body who believes that there was a departure from the requirements of subdivisions (i) and (ii), should so state prior to the vote, indicating the substance of the departure that, in his judgment, has taken place. The statement must be recorded in the minutes of the public body. (§ [2.2-3712](#))

At the end of the closed meeting, the board must immediately reconvene the open meeting. The board should send someone outside to tell anyone waiting to attend the open meeting that the meeting is reconvening. The public should be given sufficient time to reenter the room before the board proceeds to certify the closed meeting and proceed with any other business. Any agreement made, or votes taken in the closed meeting are

invalid unless they are taken again in the public meeting, with their "substance reasonably identified." (See § [2.2-3711](#) and 26.3.2, above)

### **26.3.8 Nonmembers May Attend Closed Meeting**

A public body may permit nonmembers to attend a closed meeting if such persons are deemed necessary or if their presence will reasonably aid the public body in its consideration of a topic that is a subject of the meeting. (§ [2.2-3712](#)) It is recommended that permission for such nonmembers to remain in the room during the closed meeting be stated in the motion to close the meeting.

### **26.3.9 Voting Equipment and Election Security Plans**

Certain State Board or electoral board meetings and records concerning voting equipment and election security may be closed. However, records may only be excluded from inspection and copying, and meetings may only be closed, to the extent that the records or discussions in meetings describe:


- protocols for maintaining the security of ballots or voting and counting equipment, **or** reveal the results of risk assessments of specific local electoral procedures,
- **and** the release of such records or discussion of such matters in an open meeting would compromise the security of an election.


This exemption specifically states that it does not authorize a closed meeting to discuss any breach of security in an election. (§§ [24.2-625.1](#) and [2.2-3711](#) (35))

## **26.4 Records**

### **26.4.1 Definition of a “Public Record” Under FOIA**


Public records include all records a public body or officer creates, owns, or possesses in the course of their appointment, employment, or public duties. They do not include any personal materials incidental to the job. Records no longer possessed are not included. FOIA does not require creating a record that does not exist at the time of the request, but this may be the easiest and quickest way to respond to some requests. (§ [2.2-3701](#))

 FOIA deals with records, not information, but that can be a fine distinction. An easy test is whether the FOIA request can be satisfied by delivery of an existing document or record.

 For example, if a requestor asks for the number of registered voters in a certain precinct, that information is easily available. It may be on VERIS or in a report. It's probably easier to provide the information than to tell the requestor that he or she needs to ask for the particular report that contains it. But, if he/she asks for the history of voter registration and turnout in that precinct during the last 50 years, it's probably easier for everyone to let the requestor know what records are

available in the office, and provide the choice of coming in to look at them (if local) or providing the copies at the requestor's cost. Likewise, a request explaining a decision or interpretation is not a FOIA request for a record.

Many FOIA requests that look intimidating on their face can be narrowed to a reasonable volume by working with the requestor to determine what the requestor really wants, and letting him or her know what is available that meets the need. The requestor may think that someone can "push a button" and produce a single page with everything requested, and will be overwhelmed by receiving an enormous stack of copies and a bill to match.

 FOIA is largely a matter of customer service. Most requestors won't know what report or document to request. They have an idea of what they want to find. Saying, "We don't have it" when something else is available that will meet the requestor's identified needs, is bad customer service, poor public relations, and usually results in extra work.

#### **26.4.2 Title 24.2 Controls Election and Registration Records**

Election law controls access to voter registration and election records. FOIA applies only if election law is silent. (§ [2.2-3703](#)) See Chapter 6 as to records access under Title 24.2 such as lists of registered voters.

Even if election law is silent, FOIA may provide other exceptions or exemptions. For example, § [2.2-3705.1](#) (10) allows withholding personal information as defined in § [2.2-3801](#). [2007 Op. Va. Att'y Gen. 027](#).

Determining whether a particular record is addressed by election law or exempt under FOIA may require consulting legal counsel. Once it is determined that no election law or FOIA exemption applies, the records are open to inspection and copying. Reasonable costs are allowed, including time required to redact protected information.

#### **26.4.3 Who May Request Records**

FOIA requests for state and local records can be made only by Virginia residents or media representatives with a connection to Virginia. Requests from non-Virginians or media representatives with no connection to Virginia can be denied. However, these requests do not have to be denied unless access to that record is otherwise restricted. (§ [2.2-3704](#))

#### **26.4.4 Requests Need Not Be Written or Reference FOIA**

The request does not have to be in writing. If the request is made by mail, it will contain the requestor's name and address. If it is made in person, the office may require the requestor to provide his name and legal address. Nothing in FOIA defines the way in which the requestor must provide his name and legal address, either by stating it or in

writing (such as signing a log book). If the request, name, and address are not provided in writing, write them down for the office's information and protection. (§ [2.2-3704](#) (A))

The request for records need not make reference to FOIA to invoke the requirements of the Act. If it is from a qualified requestor (a Virginia citizen or reporter -- with both categories broadly interpreted), and is a request for a document, it should be considered a FOIA request. If it is a request for information, it may be treated as a FOIA request, particularly if documents in the office can be readily identified which contain that information.

### 26.4.5 “Reasonable Specificity”

The request should include enough information for the recipient to identify whether there are any records in the office (or the official's possession) that satisfy the request. If there is any question about what is being requested, call the requestor and discuss the matter to refine the request and response. Keep notes on these discussions and file them with the request in the office correspondence file in case there is ever any question about the request and response. (§ [2.2-3704](#))

✈ For example, a requestor recently asked the State Board for "all the dead people on the books by locality" in Virginia. After discussing the matter with the requestor, he was provided with a copy of the most recent report showing the number of voters removed from the rolls as deceased, by locality, since the beginning of the year. The staff could have provided a literal response ("None, because they have been deleted if we knew they were dead"), which probably would have resulted in a second FOIA request, with different wording, and an aggravated citizen. The staff could have provided counts for many years, making assumptions about the breadth of his request instead of discussing it with him.

### 26.4.6 Response Timelines

The general rule is that the public official or employee must deliver the requested records **within five working days of receiving the FOIA request.**

Effective 7.1.2010, new legislation provides a shorter **three working day** response period for:

- Electoral board secretary responses to candidate and political party requests for officer of election lists with party designations; and
- State Board of Election responses to candidate and political party requests for instructions and other guidance to local electoral boards and general registrars.<sup>6</sup>

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<sup>6</sup> See Chapters 4 and 28.

FOIA provides exceptions to this rule that allow more time to deliver the records (see below). In all circumstances, the official or employee must respond to the FOIA request within five working days even if the records cannot be delivered within such time.

§ [2.2-3704](#) provides (in part):

- 1) Any public body that is subject to ...[FOIA] and that is the custodian of the requested records shall promptly, but in all cases within five working days of receiving a request, provide the requested records to the requester or make one of the following responses in writing:
  - a) The requested records are being entirely withheld because their release is prohibited by law or the custodian has exercised his discretion to withhold the records in accordance with ...[FOIA]. Such response shall identify with reasonable particularity the volume and subject matter of withheld records, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records.
- 2) The requested records are being provided in part and are being withheld in part because the release of part of the records is prohibited by law or the custodian has exercised his discretion to withhold a portion of the records in accordance with ... [FOIA]. Such response shall identify with reasonable particularity the subject matter of withheld portions, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records. When a portion of a requested record is withheld, the public body may delete or excise only that portion of the record to which an exemption applies and shall release the remainder of the record.
- 3) The requested records could not be found or do not exist. However, if the public body that received the request knows that another public body has the requested records, the response shall include contact information for the other public body.
- 4) It is not practically possible to provide the requested records or to determine whether they are available within the five-work-day period. Such response shall specify the conditions that make a response impossible. If the response is made within five working days, the public body shall have an additional seven work days in which to provide one of the four preceding responses.
  - a) Any public body may petition the appropriate court for additional time to respond to a request for records when the request is for an extraordinary volume of records or requires an extraordinarily lengthy search, and a response by the public body within the time required by ... [FOIA] will prevent the public body from meeting its operational responsibilities. Before proceeding with the petition, however, the public body shall make reasonable efforts to reach an agreement with the requester concerning the production of the records requested.

- b) Subject to the provisions of subsections G and J of § [2.2-3704](#), [concerning databases], no public body shall be required to create a new record if the record does not already exist. However, a public body may abstract or summarize information under such terms and conditions as agreed between the requester and the public body.


## 26.4.7 Charges

Reasonable charges not exceeding actual cost may be assessed for searching, accessing, supplying, and duplicating public records. Charges are prohibited for any extraneous, intermediary or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body. Charges may include the time needed to access, find, copy, and mail/ship the documents, and the actual cost of the copies and the mailing/shipping.

When assessing a reasonable charge, good practice and public policy support the most cost effective method of producing the records. The costs of fringe benefits or other overhead expenses may not be added to the charged personnel costs. For more information about allowable costs under FOIA, see [Taking the Shock Out of FOIA Charges: A Guide to Allowable Charges for Record Production under the Freedom of Information Act](#) on the FOIA Council website.

✈ Example 1: If a clerical employee could complete the FOIA request in one hour, then the cost is one hour's wage for the clerical employee. Example 2: If a clerical employee would spend 20 hours to complete a FOIA request but the IT staff could complete the FOIA request in 20 minutes, the cost is the cheaper of the two options – regardless of which one is utilized.

If the FOIA request is a repeat of a previous FOIA request, charge the amount to reproduce the previous records not the amount charged for the previous request.

 A FOIA request is received that requires substantial work to collect, copy, and redact the records. Weeks later, an identical FOIA request is received by another person. If a copy of the previous FOIA request is still available, the office may only charge the amount necessary to create another copy – and not the amount necessary to collect, copy, and redact the records again. If a copy of the previous FOIA request is not still available, the office may charge the amount necessary to collect, copy, and redact the records again.

If costs incurred in granting a FOIA request are expected to be above \$200, the requestor may be asked to pay in advance, and performing the request may be delayed until receipt of such advance payment.

For requests under \$200, the office may not require the requestor to pay the charges before turning over the requested documents. If any requestor does not pay in a reasonable time, report the bill to the office that handles normal debt collection for the



local government. Before processing a request for records, a public body may require the requester to pay any amounts owed to the public body for previous requests for records that remain unpaid 30 days or more after billing.

If the citizen requests an advance estimate, all charges for supplying the requested records must be estimated in advance. (§ [2.2-3704](#))

#### **26.4.8 FOIA Exclusions for Records (Personnel, Medical Records, Legal Advice, Et Cetera)**

Sections [2.2-3705.1](#) through [2.2-3705.7](#) include over 90 separate FOIA records exclusions. These are records that may be withheld under FOIA, but may be provided at the option of the record custodian unless access is otherwise restricted by law. The Freedom of Information Advisory Council's guide [Access to Public Records](#) includes an excellent summary and discussion about the records exemptions of general applicability, which includes most of the exemptions that might ever be needed by the SBE, an electoral board or a general registrar. A few others, not in that guide, are listed below.

§ [2.2-3705.1](#). Exclusions to application of chapter; exclusions of general application to public bodies. The following records are excluded from the provisions of this chapter [FOIA] but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law [the number corresponds to the exceptions prohibited by law - see code section]:

(11) Communications and materials required to be kept confidential pursuant to § [2.2-4119](#) of the Virginia Administrative Dispute Resolution Act (§ [2.2-4115](#) et seq.).

§ [2.2-3705.3](#). Exclusions to application of chapter; records relating to administrative investigations.

The following records are excluded from the provisions of ... [FOIA] but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law [the number corresponds to the exclusions - see code section]:


(8) Records of the Virginia Office for Protection and Advocacy consisting of documentary evidence received or maintained by the Office or its agents in connection with specific complaints or investigations, and records of communications between employees and agents of the Office and its clients or prospective clients concerning specific complaints, investigations or cases. Upon the conclusion of an investigation of a complaint, this exclusion shall no longer apply, but the Office may not at any time release the identity of any complainant or person with mental illness, mental retardation, developmental disabilities or other disability, unless (i) such complainant or person or his legal representative consents in writing to such identification or (ii) such identification is required by court order.

(9) Information furnished in confidence to the Department of Employment Dispute Resolution with respect to an investigation, consultation, or mediation under Chapter 10 (§ [2.2-1000](#) et seq.) of this title, and memoranda, correspondence and other records resulting from any such investigation, consultation or mediation. However, nothing in this section shall prohibit the distribution of information taken from inactive reports in a form that does not reveal the identity of the parties involved or other persons supplying information.

§ [2.2-3705.7](#). Exclusions to application of chapter; records of specific public bodies and certain other limited exemptions.

The following records are excluded from the provisions of ... [FOIA] but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law [the number corresponds to items listed in the code section]:

(2) Working papers and correspondence of the Office of the Governor; Lieutenant Governor; the Attorney General; the members of the General Assembly or the Division of Legislative Services; the mayor or chief executive officer of any political subdivision of the Commonwealth; or the president or other chief executive officer of any public institution of higher education in Virginia. However, no record, which is otherwise open to inspection under this chapter [FOIA], shall be deemed exempt by virtue of the fact that it has been attached to or incorporated within any working paper or correspondence.

-  This exception does not extend to the State Board of Elections or Electoral Boards unless they are involved in preparing working papers for the named state and local officials. For example, bill drafts and analyses that SBE policy staff prepares for the governor can only be disclosed with the consent of the specific individual governor for whom they were prepared.

As used in this subdivision:

- "Office of the Governor" means the Governor; his chief of staff, counsel, director of policy, Cabinet Secretaries, and the Director of the Virginia Liaison Office; and those individuals to whom the Governor has delegated his authority pursuant to § [2.2-104](#).
- "Working papers" means those records prepared by or for an above-named public official for his personal or deliberative use.

#### **26.4.9 No FOIA Rights for Inmates**

FOIA has a specific exclusion for persons incarcerated in state, local or federal correctional facilities. However, incarcerated persons may obtain records to exercise constitutionally protected rights, including, but not limited to, calling for evidence in his favor in a criminal prosecution. (§ [2.2-3705.7](#))

#### **26.4.10 Criminal Information**

Virginia has closed criminal records. Any information the office receives regarding criminal records (§ [24.2-409](#)) must be kept confidential. (§ [19.2-389](#)) The Division of Central Criminal Records Exchange provides felony information to SBE only for the purposes of allowing registrars to cancel the registration of any voter known to be a convicted felon. (§ [24.2-409](#) and [24.2-427](#)) Requests for information regarding criminal records should be referred to the State Police. Information obtained through the VERIS on prohibited voters is not available through FOIA.